LIBRARY
SUPREME COURT, U. S.
AUG 6 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

J. WM. BRAMMER, JR.
DECONCINI MCDONALD & BRAMMER, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

Attorneys for Respondent
Tucson School District No. 1

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

SUBJECT INDEX

		Page
Statement of the Case		1
Reasons For Denying Certiorari		2
I. Petitioner is Presenting Questions Not Argued in the Arizona Appellate Courts		2
II. No Significant Question of Federal Law		5
1. Equal Protection		5
2. Due Process		10
III. No Conflict of Decisions		11
Conclusion		11
Appendix A	Portion of Deposition of Dr. Thomas Lee	1a
B	Portion of Transcript of School District Board Meeting, November 5, 1973	4a
C	Judgment of Arizona Superior Court	7a
D	Petitioner's Opening Brief in Arizona Court of Appeals	10a
E	Portions of Respondent's Brief in Arizona Court of Appeals	21a

TABLE OF AUTHORITIES CITED

Cases	Page
Board of Regents of State Colleges v. *Roth*, 408 U.S. 564 (1972)	10
Brooks v. *School Dist. of City of Moberly*, 267 F.2d 733 (8th Cir. 1959)	9
Duignan v. *U.S.*, 274 U.S. 195 (1927)	4
Fry v. *Bd. of Educ. of City and County of San Francisco*, 17 Calif.2d 753, 112 P.2d 229 (1941)	7
Goss v. *Lopez*, —— U.S. ——, 95 S.Ct. 729 (1975)	10
Graham v. *Richardson*, 403 U.S. 365 (1971)	8
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)	8
Massachusetts Board of Retirement v. *Murgia*, 376 F. Supp. 753 (D. Mass. 1974)	11
Morey v. *Doud*, 354 U.S. 457 (1957)	8
San Antonio Independent School Dist v. *Rodriguez*, 411 U.S. 1 (1973)	9
School Dist. No. 48 of Maricopa County v. *Rivera*, 30 Ariz. 1, 243 P. 609 (1926)	6
Sorenson v. *Superior Court. in and for Maricopa County*, 31 Ariz. 421, 254 P.2d 230 (1927)	6
Walling v. *Sanders*, 136 F.2d 78 (6th Cir. 1943)	7

Statutes

Arizona Revised Statutes:

§ 15-443	7
§ 15-1471	3, 4, 5, 7, 8, 10
§ 38-745	6
§ 38-752	7
§ 38-759	7, 8

Miscellaneous

68 American Jurisprudence 2d School §§ 128, 138 (1973)	7
Black's Law Dictionary, 4th ed. 618 (1951)	7

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement Of The Case to the end of the first full paragraph on page 4 of the Petition.

However, as to Petitioner's statement concerning her "unique educational background" (page 5), no such evidence was ever presented to the Board. On the contrary, Dr. Thomas L. Lee, Respondent's Superintendent, told Respondent's Board, at a meeting held prior to a public meeting held on October 26, 1972, that there was nothing unique about either Petitioner's abilities or position. This and other statements as to Petitioner's uniqueness were reiterated by Dr. Lee in his deposition taken July 30, 1973, (the relevant extracts of which are reproduced

as Appendix A herein), and were corroborated by Mr. Patrick of Respondent's Personnel Office during the November 5, 1973, meeting between Petitioner and Respondent's Board of Trustees. Mr. Patrick's statements are set out in the portions of the transcript of the November 5, 1973, meeting reproduced as Appendix B herein.

The denial by the Board of Petitioner's Application for Retention was announced on December 19, 1973, not 1972, as stated at page 4, paragraph of the Petition. Contrary ot Petitioner's assertion that the Board heard no evidence as to either of the possible grounds for retention, the Board did consider the difficulty of replacing Petitioner. This is shown by the discussion of Petitioner's lack of uniqueness referred to in the previous paragraph. At the November 5, 1975, meeting of the Board, Petitioner introduced no evidence tending to show that she was in fact irreplaceable. The Board indeed heard no evidence on the issue of whether retiring Mrs. Lewis would be injurious to students. However, at no time did Petitioner attempt to show that her absence would be detrimental, leaving the Board free to conclude that she could be replaced with no damage to the education of the students.

Finally, the document that Petitioner sets out in her Appendix "D" is not the text of the judgment of the Superior Court for which Petitioner is seeking review, but rather a Minute Order which itself was later amended. The correct text of the Superior Court judgment is reproduced as Appendix C herein.

REASONS FOR DENYING CERTIORARI

I. Petitioner Is Presenting Questions Not Argued In The Arizona Appellate Courts

A close examination of the language Petitioner uses in stating her "Questions Presented" reveals two things:

the two questions are in reality identical, and therefore redundant; and much of Petitioner's argument for granting *certiorari* has nothing to do with the questions as stated. Moreover, a comparison of the Petition with Petitioner's arguments in her Opening Brief before the Arizona Court of Appeals (reproduced as Appendix D herein) shows that these questions were not argued in that brief, did not appear as part of the Court of Appeals' actual judgment (reproduced in Petitioner's Appendix "E"), and therefore may not be properly before this Court.

The Arizona Superior Court (judgment reproduced as Appendix C herein) made findings on the retirement age mandated by A.R.S. § 15-1471; on the authority of Respondent to set reasonable standards in retiring its teachers; on the exercise of discretion by Respondent; and on possible deprivation by Respondent of Petitioner's equal protection and due process rights. Petitioner could have appealed all these findings, but instead she based her appeal on one question.

> "Is A.R.S. § 15-1471 unconstitutional insofar as it requires all public school teachers to retire at age sixty-five, whereas all other governmental employees are permitted to continue as State employees until age seventy?"

At least three times in her Court of Appeals brief, Petitioner maintained that this was the sole basis for her appeal.

On the other hand, Petitioner is now attacking the discretion and decision of Respondent under A.R.S. § 15-1471, at least in her "Questions Presented." In other words, she appears to be assuming the validity of the statute and challenging Respondent's interpretation of the statute. Based on Petitioner's own arguments in the court below, this is manifestly not the question on which

the Arizona Court of Appeals rendered its judgment. It is true the last paragraph of the opinion (Petition, Appendix "E" at 31) finds that Respondent did not abuse its discretion in retiring Petitioner. Yet clearly this is dictum. Nowhere in Petitioner's Opening and Reply Brief in the court below did she discuss the Board's discretion; and thus, the only finding necessary for the judgment was the one concerning the constitutionality of A.R.S. § 15-1471.

This Court has held that only in exceptional circumstances will it review a question not raised in the court below. *Duignan* v. *U.S.*, 274 U.S. 195, 200 (1927). With that case, the court simply validated what has long been an axiom of Appellate practice for which hundreds of lower court cases, both State and Federal, could be cited. Since there exists no exceptional circumstances in the case at hand, this Court would not be abusing its discretion in denying *certiorari* on this ground alone.

Petitioner will no doubt point out that sections of her Petition are indeed devoted to the question of the constitutionality of A.R.S. § 15-1471. However, two criticisms would still remain. First, why was the issue not included as part of the "Questions Presented" (or alternately, if Petitioner meant her Question I to cover this issue, why did she not say so in clear, simple language)? Second, and more important, Respondent respectfully submits that even this issue is not properly before this Court, notwithstanding the fact that it was the main question on appeal below.

In making this latter assertion, Respondent is simply repeating its argument made before the Arizona Court of Appeals in its Reply brief (portions of which are reproduced as Appendix E herein). In that court, Respondent in effect pointed out that Petitioner, the Appellant below, made a substantial change of position on

her way up from Superior Court. At trial, it was steadfastly maintained by Petitioner that A.R.S. § 15-1471 made age seventy the compulsory retirement age for Arizona's teachers, and that Respondent discriminated against Petitioner for retiring her at sixty-five, especially when other school districts allowed teachers to continue working past sixty-five. (Although there was never any evidence presented in the Arizona courts as to actions of any other school district with respect to allowing teachers to work past age sixty-five.)

Having lost this argument in Superior Court, Petitioner presented on appeal the question of the constitutionality of A.R.S. § 15-1471. In doing so, she argued that sixty-five was indeed the mandatory retirement age for teachers, but since State employees were allowed to work until seventy, Respondent was denying Petitioner equal protection. In other words, at trial Petitioner argued that seventy was the mandatory age, but on appeal she argued that sixty-five was in fact the mandatory age. Respondent, in its Reply Brief below, contended that the question of whether there exists a rational basis for making sixty-five the retirement age for teachers was not an issue at trial, and therefore not reviewable.

In basing its decision on the issue as framed by Petitioner, the Arizona Court of Appeals implicitly adopted Petitioner's point of view without expressly passing on the reviewability of the question presented. However, if the lower court was erroneous in taking Petitioner's appeal in the first place, this Court should not allow the mistake to go uncorrected by again accepting Petitioner's issues without question.

II. No Significant Question of Federal Law

1. *Equal Protection*

Petitioner contends that it is unconstitutional for Respondent to set a standard of retention of teachers after

sixty-five years of age different from the standard imposed on "other State employees." This argument is based on the assumption that a public school teacher is a State employee, an assumption which is clearly erroneous under the Arizona law.

It is true, as is stated at page 6 of the Petition, that in Arizona, a school district is "an agency of the state." See *School Dist. No. 48 of Maricopa County* v. *Rivera*, 30 Ariz. 1, 243 P. 609 (1926), overruled on other grounds, 93 Ariz. 384, 381 P.2d 107 (1963). However, Arizona case law also recognizes that a school district is a political subdivision of a county, *Sorenson* v. *Superior Court in and for Maricopa County*, 31 Ariz. 421, 254 P. 230 (1927), a status which ultimately makes the school district a political subdivision of the State.

Terminology is important here because Arizona's State Retirement System, Arizona Revised Statutes (A.R.S.) § 38-741 *et seq.*,[1] makes a clear distinction between employees of the State and its instrumentalities on one hand and employees of political subdivisions on the other. For example, A.R.S. § 38-745A, (1973 Supplementary Pamphlet) which defines who is a member of the retirement system, reads in part:

> "All employees and officers of the state . . . and employees of political subdivisions . . . who as a result of state service or service for the political subdivision . . ."

Subsection B of the same statute reads in part:

> "All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds, *and who are declared to be state em-*

[1] Respondent's argument is based on the statutes as they existed in 1973, the time at which Petitioner first became subject to the provisions of the retirement system.

> *ployees and officers by the legislature* for retirement purposes . . . shall be members of the retirement system." (emphasis supplied)

The clear import of the above language is that employees of a political subdivision are *not* State employees unless they are expressly declared to be such.

Under A.R.S. § 38-752 (1973 Supplementary Pamphlet), political subdivisions are authorized to adopt a supplemental retirement system "for officers and employees of the political subdivision. . . ." Finally, the same distinction is made in § 38-759H (1973 Supplementary Pamphlet), which first declares that all State officers and employees must retire at age seventy and then makes that age limit applicable to officers and employees of "political subdivisions of the state. . . ."

The definition of who is an employer supports the above interpretation. "The usual test by which, in common experience, men determine the 'employer' is to ascertain who has authority, on his own account, to 'hire and fire'." *Walling* v. *Sanders*, 136 F.2d 78, 81 (6th Cir. 1943). *Black's Law Dictionary* defines an employer as one who pays salaries. According to A.R.S. § 15-443 (1974 Supplementary Pamphlet), the Board of Trustees of a school district, not the State, is the body authorized to employ and fix the salaries of teachers. The statute reads in part:

> "The Board of Trustees may at any time employ and fix the salaries of teachers. . . ."

See also *Fry* v. *Bd. of Educ. of City and County of San Francisco*, 17 Calif. 2d 753, 112 P.2d 229, 234 (1941) (stating that "the relation between the board and a teacher is that of employer and employee. . . ."); and 68 Am. Jur. 2d at 458, 469, Schools, §§ 128, 138.

Even if teachers were considered State employees, A.R.S. §§ 15-1471 and 38-759 are not in conflict because: (a) A.R.S. § 38-752 allows a political subdivision to devise

its own supplementary retirement system; and (b) nothing in A.R.S. § 38-759 expressly prohibits a political subdivision or even the State from requiring retirement earlier than age seventy. In any case, the purpose of A.R.S. § 38-759 is to establish the earlier time at which a member may retire and still receive benefits, and not to set out regulations concerning retirement between the ages of sixty-five and seventy.

A fortiori, if a teacher is not an employee of the State, then the fact that the relevant retirement statutes allow a teacher to be retired earlier than State employees does not constitute a denial of equal protection. The presumption that runs through the retirement statutes is that employees of the State and of political subdivisions are two separate groups, although all employees of each class are subject to the State Retirement System. If Petitioner wishes to challenge the rationality of creating these two groups in the first place, then Respondent will point out that the whole purpose of creating political subdivisions is to set up separate entities in order to handle local governmental affairs. If a rational basis for the existence of a classification is present, then a challenge based on the Fourteenth Amendment cannot be sustained. See *E. G. Graham* v. *Richardson*, 403 U.S. 365, 371 (1971); *Morey* v. *Doud*, 354 U.S. 457, 465 (1957); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The so-called "compelling state interest" or "strict scrutiny" test is not applicable in this case because this Court, as the Arizona Court of Appeals noted (Appendix "E" of Petition at 26), has not held age classifications to be a "suspect category" and because, as will be argued *infra*, there has been no deprivation or abridgement of a fundamental right.

In its own policies, Respondent has not violated Petitioner's equal protection rights. Contrary to the assertion at page 11 of the Petition, A.R.S. § 15-1471

does not "hold out the promise" of continued employment past sixty-five. Instead, all teachers "shall be retired" at sixty-five unless the School Board approves retention. The statute is explicit in giving a school district discretion in retaining teachers, a discretion which this Court and lower federal courts have deemed to be quite wide, as long as a decision is made within statutory and constitutional limits. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Brooks* v. *School Dist. of City of Moberly*, 267 F.2d 733, (8th Cir. 1959), cert denied 361 U.S. 894. Moreover, the statute does not require that the school district give any reason for its decision on whether to retain a teacher. Thus, the school district is free to adopt any rational criteria in making its decision, especially since there is no legislative history in evidence requiring that these criteria stem from any specific educational purpose or purposes.

Respecting the possible criteria for retiring or retaining teachers after sixty-five, it is simply not true that, as Petitioner claims at 7, Respondent or the State of Arizona could put forward only one rationale. The reason that Respondent, in its Brief in the court below (reproduced in part as Appendix E herein), elaborated on the fact that teaching is a profession more demanding than others is that Petitioner first raised this issue in her Opening Brief on appeal (reproduced as Appendix D herein). In doing so, Petitioner forced Respondent to argue factual questions not previously presented, and upon which no evidence had been adduced. She should not be permitted to do the same before this Court.

What other school districts decide concerning the retirement of teachers is of little relevance except insofar as those decisions may provide non-controlling examples of what may or may not be reasonable. As long as the Board does not discriminate among its own employees

(and Petitioner has made no such allegation), then Petitioner has not been deprived of her Fourteenth Amendment rights. Respondent is certainly not trying to avoid the Teacher's Retirement Act, as Petitioner charges at Page 10, but rather has complied with statutes which themselves are constitutional and has validly exercised its discretion.

2. *Due Process*

Respondent concedes the point that the right to follow a vocation or profession is a "property right" which cannot be deprived without due process. However, if A.R.S. § 15-1471 holds out no "promise" of continued employment past age sixty-five, as argued *supra*, then school district employees, even if tenured, cannot be said to have a legitimate claim of employment after that age, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972) (dealing with the dismissal of untenured college professor). Thus Petitioner does not have any property right and considerations of due process do not apply. *Bd. of Regents* v. *Roth*, *supra*.

Assuming, *arguendo*, that there is a property right involved here, due process requirements of notice and hearing have been complied with. Petitioner had notice of probable retirement at sixty-five through A.R.S. § 15-1471 and she was given a hearing on November 15, 1973, (see Appendix of Petition at 19). Apparently, Petitioner is confusing the possible due process and equal protection issues here. She cites cases such as *Goss* v. *Lopez*, —— U.S. ——, 95 S.Ct. 729 (1975), which deal with the absence of notice and hearing, but uses them to support the proposition that the State may not set different standards for various groups of employees. In addition, she cites no cases to support her argument that there is a right to continue teaching after normal retirement age. Respondent has in fact more than ful-

filled its duties by providing notice and hearing where none were constitutionally necessary.

III. No Conflict Of Decisions

As Petitioner herself states at page 5 of the Petition, this is not a mandatory retirement age case. Therefore, cases dealing with mandatory retirement ages are not relevant here; and the fact that this Court has granted review in *Massachusetts Board of Retirement* v. *Murgia*, 376 F.Supp. 753 (D. Mass. 1974), has no bearing on the case at hand. Furthermore, even if such cases were pertinent, they all support *reasonable* age limits. Finally, Petitioner cites no decisions limiting a Board's discretion where constitutional safeguards have been observed, so that this Court is not being called upon to resolve any important conflicts in judicial decisions.

CONCLUSION

For all the reasons stated above, the decision of the Supreme Court of Arizona to deny review of Petitioner's case and the decision of the Court of Appeals on which that denial was based (set out in Appendix "E" to Petitioner's brief at 23 *et seq.*) were clearly correct. There has been no deprivation of Petitioner's Fourteenth Amendment rights which needs redress by this Court. Since this is a case involving the proper exercise of discretion on the part of Respondent, there is no need for the Court to impose additional standards on Respondent's decision making process. This is all the more true since retirement criteria, if reasonable and constitutional, are a matter of local and not national concern. A decision that Mrs. Lewis should be allowed to continue working would have little application to other litigants and situations, because other school districts would still retain the discretion to set their own retirement standards. For this Court to reverse Respondent's decision and strike down

the Arizona statute which allows Respondent discretion in such matters would be unwarranted invasion of the legislative sphere of State and local governmental activity. As argued *supra*, the Arizona legislature has not discriminated between sets of State employees: it has simply permitted different and distinct public employers to set their own rational retirement ages. This difference in treatment is consonant with the Constitution and its protections.

It is therefore respectfully submitted that Mrs. Lewis' Petition For Writ Of Certiorari to review the judgment of the Arizona Supreme Court denying the Petition for Review and the judgment on the merits of the Arizona Court of Appeals should be denied.

RESPECTFULLY SUBMITTED this 5th day of August, 1975.

DeConcini McDonald & Brammer, P.C.

BY J. Wm. Brammer, Jr.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701

Attorneys for Respondent
TUCSON SCHOOL DISTRICT NO. 1